

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFREY E. EBERLEIN and TRISHA EBERLEIN, | CASE NO. 2:22-cv-1827

Plaintiffs,

v.
MICHELS CORPORATION, and JOHN
DOES 1-5,

CASE NO. 2:22-cv-1827

Defendants.

1. INTRODUCTION

This matter comes before the Court on Plaintiffs Jeffrey E. Eberlein and Trisha Eberlein's Motion to Compel the depositions of Defendant Michels Corporation and its employee Nick Noradoun. Dkt. No. 15.

2. BACKGROUND

This matter was removed from state court on December 27, 2022. Dkt. No. 1. The Eberleins' action arises out of an injury Jeffrey E. Eberlein suffered while working for Michels in 2020. Dkt. No. 1-1 at ¶ 1.3. A stacked I-beam fell onto Eberlein, crushing his leg. *Id.* at ¶ 2.9. The Eberleins allege the I-beams were negligently stacked, the fact of the accident alone speaks to Michel's negligence (i.e.,

1 res ipsa loquitar), and Michels breached a contractual duty owed to Mr. Eberlein as
2 a third-party beneficiary. *Id.* at ¶¶ 2.10, 3.1-3.5, 3.6-3.9, 3.10-3.13.

3 Plaintiffs seek to depose Michels's designated Rule 30(b)(6) witnesses and
4 Michels's Safety Coordinator, Nick Noradoun. Dkt. No. 15 at 1. Plaintiffs claim they
5 have been trying to "secure deposition dates for almost eight (8) weeks," and "after
6 finally setting a properly noticed date, Michels [sic] Rule 30(b)(6) witness and Mr.
7 Noradoun failed to appear arguing that they were not ready." *Id.* at 1-2.

8 This issue unfolded between the parties over a series of communications from
9 June 8 to July 26, 2023. *See* Dkt. No. 16. On June 8, 2023, the Eberleins sent
10 Michels an undated 30(b)(6) deposition notice, "intending to work with counsel to
11 find mutually agreeable dates." Dkt. No. 15 at 3. On June 30, 2023, "after receiving
12 no response" from Michels, the Eberleins sent Michels a Rule 30(b)(6) deposition
13 notice and a deposition notice for Nick Noradoun for July 20, 2023. *Id.* at 4. The
14 Eberleins included a cover letter providing that "if the July 20, 2023 date did not
15 work, then Plaintiffs would agree to move the depositions to a mutually agreeable
16 date no later than August 3, 2023." *Id.* Generally, Michels was non-committal about
17 deposition dates and the Eberleins continued to postpone the deposition dates. *See*
18 *id.*

19 The parties talked on the phone on July 12, 2023. *Id.* The Rule 30(b)(6)
20 deposition and Noradoun's deposition were moved to July 26, 2023, but the
21 Eberleins represent that Michels "advised that this was still possibly subject to
22 witness availability." *Id.* at 4-5. The Eberleins found Michels's "lack of definitive
23 commitment [unsatisfactory]." *Id.* at 5. On July 14, 2023, the Eberleins issued

1 amended notices for the July 26, 2023, Rule 30(b)(6) and Noradoun depositions. *Id.*
2 On July 21, 2023, Michels stated through counsel that it could not prepare and
3 present a witness on July 26 and stated that it preferred to produce witnesses after
4 Mr. Eberlein's deposition, scheduled for September 14, 2023. Dkt. No. 16-9 at 4.
5 Michels's counsel stated, “[p]lease let me know . . . if you intend to pursue motions
6 practice.” *Id.* at 2.

7 The Eberleins' counsel responded that same day, objecting to moving the
8 deposition date, saying “[l]et's chat Monday,” and asking why Plaintiffs could not
9 depose Noradoun “at a minimum.” Dkt. Nos. 16 at 3, 4; 16-9 at 4. Three days later,
10 on July 24, 2023, the Eberleins again emailed and called Michels's counsel “to either
11 confirm or cancel the court reporter” for the July 26 deposition. *Id.* at 4. In an email
12 stating that he would strike the court reporter for the scheduled depositions,
13 Eberleins' counsel stated, “I will file a motion to compel.” Dkt. No. 16-10 at 5.
14 Michels responded, “[b]y the time any motion to compel is heard in federal court we
15 are almost certainly going to have provided dates and times for the requested
16 deposition(s) so the motion would not be an efficient use of client, counsel or court
17 resources,” and “July 26 was offered in an effort to help deposition schedule and to
18 share my own availability, but I was careful to stress during our phone discussion
19 that I needed to check on witness availability to confirm the depositions could go
20 forward on that date . . .” *Id.* at 7. The parties agreed to discuss further over the
21 phone on July 26, 2023. *Id.*

22 On July 26, 2023, Michels's counsel responded to the Eberleins' request for a
23 confirmation of their conferral call stating that counsel would identify “times to

confer and update you as soon as possible” but that “[a]n urgent family medical issue prevented me from responding sooner.” Dkt. No. 16-11 at 2. The same day, Eberleins’ counsel “advised [Michels’s counsel] she could call his cell phone at any time to discuss new dates,” but states “[n]o phone call or email has been forthcoming” and there has been no date provided as of the filing of this motion. Dkt. No. 16 ¶ 25, Dkt. No. 16-11 at 2. Eberleins’ counsel concluded the email, stating “I’ll file the motion to compel next week and am now working on it.” Dkt. No. 16-11 at 2. The Eberleins moved to compel on August 2, 2023. Dkt. No. 15.

3. ANALYSIS

Under Rule 37(a), the Court has the authority to compel discovery. *HDT Bio Corp. v. Emcure Pharm., Ltd.*, C22-0334JLR, 2023 WL 4296412, at *2 (W.D. Wash. June 30, 2023). “Although Rule 37(a)(3)(B)(i) generally is invoked when a deponent refuses to answer a particular question during a deposition, courts in this Circuit also have granted motions to compel under Rule 37(a)(3)(B)(i) in cases where a deponent failed to attend a noticed deposition.” *RG Abrams Ins. v. Law Offices of C.R. Abrams*, 221-CV-00194-FLA-MAAx, 2021 WL 4974648, at *7 (C.D. Cal. July 26, 2021) (citing *Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1222 (9th Cir. 2018)). Courts use this rule to compel the deposition of parties and non-parties alike. *RG Abrams Ins.*, 2021 WL 4974648, at *7. But “a nonparty’s attendance generally can be compelled only by subpoena.” *Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1222 (9th Cir. 2018).

1 **3.1 The Eberleins meet the conferral requirement under Rule 26 and**
2 **LCR 26.**

3 Michels argues that the Eberleins failed to confer in good faith before
4 bringing their motion to compel, citing Rules 30, 37, and LCRs 1 and 26. Dkt. No. 18
5 at 9. Under Rule 37, a motion to compel “must include a certification that the
6 movant has in good faith conferred or attempted to confer with the person or party
7 failing to make disclosure or discovery in an effort to obtain it without court action.”
8 Fed. R. Civ. P. 37(a)(1). Under LCR 37(a), “[a] good faith effort to confer with a
9 party . . . not making a disclosure or discovery requires a face-to-face meeting or a
10 telephone conference.” “[W]hen parties file discovery motions without talking in
11 good faith, they risk engendering ill will and wasting the parties’ and the Court’s
12 time.” *Selim v. Fivos, Inc.*, No. C22-1227-JCC, 2023 WL 3172467, at *1 (W.D. Wash.
13 May 1, 2023).

14 Eberleins’ counsel certifies that he conferred with Michels before filing the
15 motions at-issue. *See* Dkt. No. 16 ¶ 29. Still, Michels argues that Eberleins’ counsel
16 did not demonstrate “a high degree of professionalism and collegiality” and good
17 faith. Dkt. No. 18 at 10. Specifically, Michels complains that the Eberleins noted the
18 Rule 30(b)(6) deposition date “[e]ven though Plaintiffs’ counsel knew” that date
19 would not work and when Michels informed Eberleins’ counsel that its designees
20 would not be available. *Id.* Michels cites no case law in support of its position.

21 Instead, Eberleins’ counsel made several requests to confer with Michels
22 regarding the 30(b)(6) and Noradoun’s depositions. *See, generally*, Dkt. No. 16.
23 Notably, the Eberleins themselves were equivocal on a deposition date, but not for

1 later than August 3, 2023. Dkt. No. 16 ¶ 9; 16-7 at 2. On July 24, 2023, Eberleins'
2 counsel explicitly told Michels that they would move to compel without Michels's
3 proposed deposition dates. Dkt. No. 16-10 at 5. Michels's counsel acknowledged that
4 the Eberleins attempted to contact Michels not only with emails, but also via
5 telephone. *Id.* at 7. When Eberleins' counsel asked whether Michels's counsel would
6 confer the next day, Michels's counsel cited a medical emergency for the delayed
7 response and stated, "I will identify available times to confer and update you as
8 soon as possible." Dkt. No. 16-11 at 2. In response, Eberleins' counsel restated his
9 position that the July 26, 2023, deposition should have proceeded and that "[i]f you
10 contend there is a reason to meet and confer, let me know, and call my personal
11 cell," and reiterated that he would move to compel. Dkt. No. 16-11 at 2. It does not
12 appear that Michels's counsel followed-up and Michels did not move for protective
13 order at that time. *See* Dkt. Nos. 16 ¶ 25; 19 ¶ 6.

14 The Court credits Michel's implicit point that parties should work
15 cooperatively to resolve run of the mill scheduling issues—perhaps a few more
16 phone calls or emails between the parties would have resolved the issues presented
17 here without the need for Court involvement. But the civil rules entitle the
18 Eberleins to take prompt discovery, and their efforts to do so do not constitute a
19 lack of professionalism or goodwill, as Michels argues. Dkt. No. 18 at 9.

20 On this record, the Court finds Michels, not the Eberleins, failed to promptly
21 respond to the Eberleins' deposition requests, and further, that Michels failed to
22 move for a protective order to the extent that it wished to resist the Eberleins'
23 efforts. *See* Dkt. Indeed, Eberleins' counsel made multiple requests for conferral,

1 but Michels was untimely or absent with its responses with proposed deposition
2 dates.

3 Thus, the Eberleins have met the conferral requirement under Rule 37 and
4 LCR 37.

5 **3.2 The Eberleins' Rule 30(b)(6) deposition notices for July 26, 2023, were reasonable.**

6 Under Fed. R. Civ. P. 30(b)(6), “a party may serve notice on an organization
7 that describes ‘with reasonable particularity the matters on which examination is
8 requested.’” *Boyer v. Reed Smith, LLP*, No. C12-5815 RJB, 2013 WL 5724046, at *2
9 (W.D. Wash. Oct. 21, 2013). The Rules permit parties to “obtain discovery regarding
10 any nonprivileged matter that is relevant to any party’s claim or defense and
11 proportional to the needs of the case . . .” Fed. R. Civ. P. 26(b)(1).

12 The Eberleins argue that Michels Rule 30(b)(6) designee should be compelled
13 to attend a deposition after failing to do so at a properly noticed deposition for July
14 26, 2023. Michels argues that it agreed to produce witnesses “this fall,” and that the
15 Eberleins failed to provide “reasonable notice” of the Rule 30(b)(6) deposition topics
16 for its designees. Michels’s arguments fail.

17 First, Michels contends that the Eberleins’ motion should be denied because
18 “Michels has agreed to produce witnesses for deposition and is diligently working to
19 find” dates, apparently for five witnesses. Dkt. No. 18 at 8. Michels misses the
20 point. The Eberleins properly noted a Rule 30(b)(6) deposition for July 26, 2023.
21 Michels failed to move for a protective order, failed to produce its witnesses on July
22 26, 2023, and then failed to provide the Eberleins with alternative dates before the
23

1 Eberleins brought this motion. Indeed, the Eberleins told Michels that they would
2 bring a motion to compel on July 24 and July 26, 2023—yet Michels still did not
3 attempt to confer further on the matter or move for a protective order. *See* Dkt. Nos.
4 16-10 at 2, 5; 19. The fact the Eberleins “do not cite to any concerns in meeting
5 these deadlines other than simply wanting depositions to be completed sooner
6 rather than later” is beside the point. Dkt. No. 18 at 8. Rule 30(b)(6) provides the
7 Eberleins the right to depose Michels’s witnesses upon a properly noticed
8 deposition. Fed. R. Civ. P. 30(b)(1), (6). They have satisfied this requirement. *See*
9 Dkt. No. 16-8 at 2.

10 Second, Michels broadly argues the Eberleins’ deposition notices did not give
11 them reasonable and sufficient time to prepare its designees. Dkt. No. 18 at 10.
12 Rule 30 does not define what “reasonable notice” requires for a 30(b)(6) deposition,
13 but Federal courts have held that 14, 10, 8, and even 5 days is reasonable notice
14 under specific circumstances. *Paige v. Consumer Programs, Inc.*, 248 F.R.D. 272,
15 275 (C.D. Cal. 2008) (fourteen days’ notice was reasonable); *Jones v. United States*,
16 720 F. Supp. 355, 366 (S.D.N.Y. 1989) (eight days’ notice was reasonable); *In re*
17 *Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 328 (N.D. Ill. 2005) (ten business
18 days’ notice “seem[ed]” reasonable); *P.S. v. Farm, Inc.*, No. 07-CV-2210-JWL, 2009
19 WL 483236, at *4 (D. Kan. Feb. 24, 2009) (five days’ notice was reasonable).

20 The Eberleins provided Michels notice of its 30(b)(6) depositions on June 30,
21 2023, for a July 20, 2023 deposition. Dkt. No. 16 at 2. When Michels’s counsel was
22 unavailable for that date, the parties conferred on July 12, 2023, and postponed the
23 depositions to July 26, 2023. Dkt. No. 16-7 at 2. So Michels had notice of the

1 Eberleins' 30(b)(6) deposition notice since June 30, 2023, which is more than
2 twenty-six days before the amended deposition date at-issue here.

3 Further, without explicitly stating their objection to the deposition notice
4 topics, Michels argues the Eberleins' "requests for corporate testimony on at least
5 18 very broad topics that require the testimony of one or more designees," and that
6 Michels needs "sufficient time to navigate busy schedules to find mutually-
7 agreeable dates" for the witnesses and preparation. Dkt. No. 18 at 10. At the time,
8 Michels did not object to the Eberleins' deposition topics and now provides no
9 convincing facts to show why 26 days was not sufficient time to identify and prepare
10 a designee or designees to testify about the topics listed on the Eberleins' notice. In
11 fact, Michels's counsel insinuated on July 12, 2023, that it could have witnesses
12 identified and prepared for a deposition on July 26, 2023, stating "I understand . . .
13 the parties will hold July 26 for the depositions of Nick Noradoun and Michels
14 30(b)(6) witnesses subject to witness availability." Dkt. No. 16-7 at 2. The Eberleins'
15 motion to compel Michels's Rule 30(b)(6) designee or designees to testify is
16 GRANTED.

17 **3.3 The Eberleins failed to subpoena Noradoun, a non-party witness.**

18 The Eberleins argue the Court should compel Noradoun to a deposition. Rule
19 30 allows for a party to depose a corporate party by issuing a notice naming the
20 entity as the deponent and describing the matters on which examination is
21 requested. Fed. R. Civ. P. 30(b)(6). Similarly, a deposition notice is all that is
22 required to compel the testimony of an officer, director or managing agent of a
23 corporate party. *See Calderon v. Experian Info. Sols., Inc.*, 287 F.R.D. 629, 631 (D.

1 Idaho 2012), *aff'd*, 290 F.R.D. 508 (D. Idaho 2013). A subpoena is necessary to
2 obtain the testimony from anyone who is not otherwise a party to the action. *See*
3 Fed. R. Civ. P. 45, *id.*; *see also Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1224
4 (9th Cir. 2018) (“[W]ithout a subpoena neither plaintiffs nor the court could have
5 compelled [a nonparty] to appear at the deposition.”).

6 The Eberlein describe Noradoun as Michel’s “site safety superintendent,” but
7 neither party describes whether he is an “officer, director or managing agent” of the
8 company such that a simple deposition notice will suffice to command his
9 appearance. *Calderon*, 287 F.R.D. at 631. Unless Noradoun was vested with the
10 general power and discretion over corporate activities to be considered a managing
11 agent, the Eberleins were required to subpoena him as a non-party employee “fact
12 witness” to compel his deposition attendance. *See* Dkt. No. 15 at 8. The Eberleins do
13 not include a subpoena, or refer to a subpoena or service of a subpoena, to Noradoun
14 in their motion. *See id.* The Eberleins have therefore failed to demonstrate that
15 Noradoun’s deposition has been properly noticed or subpoenaed, and for this reason,
16 the Eberleins’ motion to compel Noradoun deposition is DENIED.

17 **3.4 Michels is not entitled to a protective order.**

18 Michels moves for a protective order under Rule 26(c). Dkt. No. 18 at 11-12.
19 The Court may enter a protective order upon a showing of good cause to protect a
20 party from “annoyance, embarrassment, oppression or undue burden or expense.”
21 Fed. R. Civ. P. 26(c). Michels claims there is good cause here for a protective order
22 to “allow Michels to present witnesses according to their availability.” Dkt. No. 18 at
23 12. Not only does the Court disagree that this constitutes good cause—at this point,

1 Michels has had more than two months to identify and prepare its 30(b)(6)
2 witnesses—Michels provides no proof that it conferred with the Eberleins regarding
3 their belated protective order. *See* Fed. R. Civ. P. 26; LCR 26. Indeed, Michels's
4 representations on July 24, 2023, suggest that its need for a protective order would
5 diminish with additional time to identify dates and times for its 30(b)(6) witnesses:
6 “[b]y the time any motion to compel is heard in federal court we are almost certainly
7 going to have provided dates and times for the requested deposition(s).” Dkt. No. 16-
8 10 at 7. Michels's request for a protective order is DENIED.

9 **3.5 The Eberleins will not receive fees for this motion.**

10 Finally, the Eberleins request sanctions under Rule 37. When the Court
11 grants a motion in part and denies in part, Rule 37 states, “the court may . . . after
12 giving an opportunity to be heard, apportion the reasonable expenses for the
13 motion.” Fed. R. Civ. P. 37(a)(5)(C). The Court has denied in-part the Eberleins'
14 motion to compel. The Court reiterates that “[d]iscovery motions are strongly
15 disfavored.” *Selim v. Fivos, Inc.*, 2023 WL 3172467, at *1. Most discovery issues are
16 avoidable if the parties simply “talk with one another in good faith.” *See id.* This is
17 especially true for the scheduling issues at-issue here. The motion for fees is
18 DENIED.

19 Dated this 20th day of October, 2023.

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21

22

Jamal N. Whitehead
United States District Judge
23